Calendar No. 314

101ST CONGRESS *1st Session*	SENATE	REPORT 101-172

TRANSPORTATION EMPLOYEE TESTING ACT OF 1989

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 561

OCTOBER 25 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

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REPORT

[To accompany S. 561]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 561) to provide for testing for the use, without lawful authorization, of alcohol or controlled substances by the operators of aircraft, railroads, and commercial motor vehicles, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, as reported, would require the Secretary of Transportation (the "Secretary"), in the interest of safety, to issue rules within twelve months of enactment to establish drug and alcohol testing programs for certain individuals employed in safety-sensitive positions in the aviation, rail, and motor carrier industries.

The bill would provide for five types of testing, including random, pre-employment, post-accident, periodic recurring, and reasonable suspicion testing. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by the Department of Health and Human Services (HHS) and the Department of Transportation (DOT), require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondis-

criminatory and impartial methods. It would also require the Secretary to mandate the development of rehabilitation programs for certain employees who are found to have used illegal drugs or alcohol.

The bill would establish a statutory mandate for the testing rules issued by the DOT in 1988 for the aviation and motor carrier industries, and in 1985 and 1988 for the rail industry. It also would require DOT to supplement these rules with requirements for alcohol testing.

Background and Needs

SUBSTANCE ABUSE IN TRANSPORTATION

Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism.

In the transportation sector, the costs of drug and alcohol use are clearly magnified. Whenever individuals board an airplane, train, or motor carrier, they put their lives into the hands of those whose are being paid to ensure safe passage. This trust relies upon the vigilance of trained employees to remain alert to any possible occurrence that might endanger the safety of the travelling public. The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions mandates that every effort be made to eliminate the cause of that threat.

At no time was this made more evident than after the January 1987 crash in Chase, Maryland between an Amtrak passenger train and a Conrail freight train, which resulted in 16 fatalities and 170 injuries. The Conrail train's engineer and brakeman subsequently testified that they had been smoking marijuana in the cab of the Conrail locomotive prior to the fatal accident. The National Transportation Safety Board (NTSB) further found that a probable cause of the accident was the engineer's failure, as a result of impairment from marijuana, to stop his train in compliance with cab and wayside signals. In addition, testing indicated the brakeman had traces of the hallucinogenic drug PCP in his urine. Given the results of recent research which shows that certain drugs, such as marijuana, can impair an individual's performance up to 24 hours after consumption, substance abuse remains a serious matter of concern.

The problem of drugs and alcohol in the rail industry has continued. In 1988, there were 29 rail accidents in which either drugs or alcohol were involved—one accident involving drugs or alcohol every 12½ days. Eight rail workers were killed in these accidents and 41 others were injured. During the first seven months of 1989, there were 13 accidents in the rail industry after which one or more workers tested positive for drugs or alcohol in post-accident testing.

Other examples involving drugs or alcohol include the January 1988 crash of a commuter plane near Durango, Colorado in which nine persons died and about which the NTSB ruled that a pilot's cocaine use was a contributing cause. Also, a report by the Inspector General of the DOT that 10,300 active airmen certified by the Federal Aviation Administration (FAA) had their auto driver's licenses suspended or revoked for driving while intoxicated between 1980 an 1987. Under the FAA's random testing program of air traffic controllers, 117 safety-sensitive employees, including 83 air traffic contollers, have tested positive for drug use between September 1987 and September 1989.

With respect to the commercial motor carrier industry, the number of alcohol- and drug-related accidents has been high. Substance abuse by truck drivers first was highlighted to the Committee when the Insurance Institute for Highway Safety released the results of a 1986 study showing that of a random sample of 300 truck drivers, and among those 88 percent who agreed to be tested, 18 percent tested positive for the presence of controlled substances or alcohol.

Additionally, representatives of the trucking industry testified at a July 1986 Committee hearing that illegal drugs are bought and sold with the aid of the CB radio at virtually every truck stop in the country. That this practice continues has been confirmed by a number of television and newspaper investigative reports, and by undercover sting operations conducted in August 1988 and May 1989 by the California Attorney General at California truck stops which resulted in the drug arrest of 180 people, including 40 drivers of 80,000 pound trucks.

The problem with drug and alcohol use by truck drivers appears to be worsening over time. Tennessee's arrests of commercial drivers for possession of drugs and alcohol went from 193 in 1983 to 838 in 1986. Tennessee's enforcement personnel only increased from 43 to 66 during this period.

In October 1988, the NTSB published findings related to its study of 189 tractor-trailer accidents occurring during the previous three years, 26 of which were directly attributable to alcohol or drug use. These include the following accidents.

On April 1, 1986, in Dumas, Arkansas, a tractor-trailer driver failed to brake for a passenger car in front of him that was slowing down to turn off the highway. The 34-ton truck smashed into the back of the car, instantly killing all five occupants. The NTSB report notes that the driver's blood alcohol content (BAC) was over the legal limit and that he had a previous record for driving while intoxicated.

That same month, a truck driver in Chino, California, ignored a red light signal and crashed into two passenger cars. The collision killed the driver of one of the cars and injured a passenger in the truck. Police found a pipe used for smoking marijuana in the cab of the truck. In addition, a blood analysis revealed a BAC level of 0.21 percent—twice the then existing legal limit of 0.10 percent. That is five times the newly established BAC limit of 0.04 for commercial drivers.

On March 7, 1987, in Diamond Bar, California, a tractor-trailer driver set off a series of collisions by failing to stop for traffic

backed up from a previous accident; fifteen persons were injured and two were killed. In addition to having a BAC level of 0.15 at the time of the accident, the driver was experiencing withdrawal symptoms from his self-confessed heroin addiction.

In June of 1987, NTSB investigators studied an accident in which a tractor-trailer collided with a passenger train, causing a derailment and injuring 28 rail passengers. The coroner's examination of the truck driver found his blood alcohol level at two and one-half times that allowed by law.

Not every motor carrier accident involving substance abuse was considered by the NTSB. There have been other accidents involving drug and alcohol use in the trucking industry.

For example, on May 19, 1988, a truck driver rammed more than two-dozen vehicles on a Los Angeles freeway, but miraculously caused only minor injuries. Police found amphetamines, a hypodermic syringe, and a partly smoked marijuana cigarette in his cab. In October of 1988, near Fort Hancock, Texas, a truck driver forced several motorists off the highway, injuring seven persons and killing a woman. After shooting a police officer, the driver tried to run the officer down with his tractor-trailer. The police on the scene said the driver was apparently driving under the influence of drugs.

There was a similar tragedy over the 1988 Christmas holidays. The driver of a tractor-trailer rig went on an 80-mile long rampage down Interstate 10 and through rush hour traffic in San Antonio. During this rampage, the tractor-trailer crashed into more than 20 other vehicles and seriously injured two people. When the driver was arrested, he did not seem to know that he had done anything wrong. Police later found cocaine in the cab of the truck and filed drug charges against the driver.

The driver's themselves recognize there is a problem. The 1986 Annual Motor Carrier Safety Survey of commercial drivers revealed that 40 percent of them believe at least half of their colleagues sometimes drive under the influence of drugs. The 1987 Motor Carrier Safety Survey further found that 73 percent of commercial drivers supported mandatory random alcohol and drug testing of all commercial motor vehicle drivers.

In the 1988 Motor Carrier Safety Survey, drivers responded that they believe 30 percent of their fellow drivers regularly drive under the influence of illegal drugs. Seventy-eight percent of all union member drivers said they supported mandatory random drug and alcohol testing compared to 67 percent of non-union drivers. Sixty-one percent of those drivers who support testing believe it would be most appropriate for employers to conduct drug and alcohol tests as opposed to government officials at roadside inspections.

The May 29, 1988 "Transport Topics" reported that 88 percent of the people questioned during a recent straw poll taken at the East Coast Truck Show in Baltimore say they support drug testing of truck drivers. Ninety-three percent said they would be willing to be tested. (Eighty-four percent of the people surveyed said they drove trucks for a living.)

Substance abuse is also a serious problem in the bus industry. During a November 1983 strike, Greyhound took applications from a group of experienced intercity bus drivers. Greyhound found that

30 percent of the applicants' urine samples tested positive for marijuana.

In April 1987, a bus struck an overpass on the George Washington Parkway in Alexandria, Virginia, killing one and injuring 32 passengers. The driver tested positive for cocaine, valium, and marijuana. In July 1988, a bus driver was arrested for drug use after veering off the freeway into a grove of trees near Egg Harbor, New Jersey. Three of the 43 church group members on board were seriously injured.

This legislation is intended to deter the use of alcohol and drugs by those in these safety-sensitive positions through increased testing. The bill does this by requiring the testing of such employees in several situations: prior to employment, after an accident, upon reasonable suspicion, and on a random basis. The bill also authorizes testing during recurring situations such as physical examinations.

The Committee believes that increased testing is necessary to deter the use of illegal drugs and alcohol by employees in safety-sensitive positions. There are several instances where testing programs have acted as successful deterrents to the abuse of illegal drugs and alcohol. Within DOT, the Coast Guard, which randomly tests its uniformed personnel, has found that the number of individuals testing positive has declined from 10.3 percent in fiscal year 1983, when the testing began, to 2.8 percent in fiscal 1988. After the Department of Defense instituted a random testing program, drug use in the military was cut by 82 percent and the percent of positive test results dropped from a 27-percent usage rate in 1980 to 4.8 percent in 1988.

Large numbers of transportation employees in safety-sensitive positions work in an environment with little, if any, direct supervision. Therefore, a strong deterrent, such as the threat of being detected and sanctioned for drug and alcohol use, is particularly needed. While several types of testing are needed to address specific situations, the key to deterrence is random testing. Under random testing, transportation employees in safety-sensitive positions will have no advance warning of when they might be tested. With an increased likelihood of detection, they will think twice about using illegal drugs or drinking on the job. It is the resultant elimination of drug and alcohol usage by such employees that this legislation is intended to accomplish.

ACCURACY OF TESTING

In any drug and alcohol testing program, accuracy is essential. This is necessary both to ensure that individuals do not escape detection and, most importantly, to ensure against erroneous positive test results.

Given the Committee's commitment to accuracy in testing and to the protection of employees, it is important to address the issue of so-called "false positives." Opponents of drug testing will often cite the number of "false positives," particularly in initial screenings, as evidence against the accuracy of testing. It is true that in initial screenings the presence of drugs and alcohol can be indicated and that in subsequent confirmation tests a "negative" can be shown,

leading to the conclusion that the first test constituted a "false positive." This inconsistency would be cause for significant concern if a second test were not required by the bill to confirm any initial screening which suggested a positive reading, and if any conclusion were attached to the results of the initial screening. The Committee, however, has taken great care to protect employees both by requiring that a second test of high laboratory quality be administered to confirm any initial screening which indicates the use, in violation of law or Federal regulation, of alcohol or a controlled substance, and by requiring confidential treatment of the initial screening. No conclusion can be reached from the initial screening, and any specimen testing negative on confirmation shall be reported as negative, without disclosure of the results of the screening test. By incorporating laboratory certification and testing procedures developed by the Department of Health and Human Services (HHS) and DOT and by providing for the subdivision of specimens and the opportunity for an independent test of positive samples, the Committee has further taken affirmative steps to ensure accuracy.

Estimates as to the level of accuracy in the initial screenings vary, although the Congressional Research Service, in a report entitled "Constitutional Analysis of Proposals to Establish a Mandatory Public Employee Drug Testing Program" dated April 12, 1988, has stated that initial drug screening tests can be between 95 and 99 percent effective. At present, Gas Chromatography/Mass Spectrometry (GC/MS) is the method most widely used for confirmation testing. GC/MS is considered by technical experts and the Federal courts to be virtually 100 percent accurate when performed properly by knowledgeable lab personnel. This legislation requires that either GC/MS or another equally accurate test be used to confirm any initial screening which indicates the use, in violation of law or Federal regulation, of alcohol or a controlled substance.

The safeguards included in the bill are intended to bring about accuracy by protecting the integrity of samples, providing for a proper chain of custody, and ensuring that laboratories are properly equipped and meet Federal accreditation and proficiency standards necessary to provide for accurate test results.

THE CONSTITUTIONALITY OF DRUG AND ALCOHOL TESTING

A. THE DRUG AND ALCOHOL TESTING OF SAFETY-SENSITIVE TRANSPORTATION EMPLOYEES COMPLIES WITH THE FOURTH AMENDMENT: THE PROPOSED DRUG AND ALCOHOL TESTING PROGRAM DOES NOT CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment to the Constitution of the United States protects individuals from unreasonable searches and seizures. Its basic purpose is to safeguard the privacy and security of individuals against arbitrary and unreasonable intrusions by the government and its agents.

The Supreme Court has determined that obtaining bodily fluids for the limited purposes of drug and alcohol testing is a search within the purview of the Fourth Amendment, see *Skinner* v. *Na-*

tional Railway Executives' Association, 489 U.S. , , 109 S. Ct. 1402, 1412–1413 (1989). The relevant inquiry, therefore, is whether or not toxicological testing of employees in safety-sensitive positions, in the absence of an individualized suspicion, constitutes an unreasonable search in violation of the Fourth Amendment.

Determining the reasonableness of a challenged search requires a three-pronged analysis to determine (1) whether or not the proposed search requires the issuance of a warrant, (2) whether or not a finding of probable cause or an individualized suspicion is a prima facia requirement, and (3) whether the intrusion imposed upon an employee's reaonable expectation of privacy is overcome by the government's compelling interest in protecting public safety.

A Warrant Is Not Necessary to Render the Search at Issue Reasonable.

It is well settled that except in certain carefully defined classes of cases a search is unreasonable unless it has been authorized pursuant to a valid search warrant. See *Camara* v. *Municipal Court,* 387 U.S. 528, 528–529 (1967).

This past term the Supreme Court handed down two seminal decisions which have specifically addressed the reasonableness of warrantless searches conducted in the absence of either probable cause or an individualized suspicion of drug or alcohol abuse. In *Skinner* v. *National Railway Labor Executives' Association,* 489 U.S. , 109 S. Ct. 1402 (1989) and its companion case, *National Treasury Employees Union* v. *Von Raab,* 489 U.S. , 109 S. Ct. 1284 (1989), the Court held that neither the issuance of a warrant, a showing of probable cause, nor an individualized suspicion of substance abuse is essential in rendering a search reasonable.

Skinner overturned a decision handed down by the Ninth Circuit which held that Federal Railroad Administration (FRA) regulations mandating post-accident testing of railroad employees in the absence of a particularized suspicion violated the Fourth Amendment. The challenged FRA regulations required railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents; a separate section of the regulations authorized (but did not require) railroads to administer breath or urine test or both to covered employees who violate certain safety rules.

Von Raab affirmed the decision of the Fifth Circuit which had upheld the reasonableness of testing U.S. Customs Service employees slated for promotion into either positions that involved interdicting illegal narcotics, or positions that required the employee to carry firearms. In *Von Raab,* members of the Customs Service, which has as its primary enforcement mission the interdiction and seizure of illegal drugs smuggled into the country, had implemented a screening program requiring a urinalysis test from Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the employee to carry firearms or to handle "classified" materials.

The Court in both cases was of the opinion that requiring the issuance of a search warrant in this context would do little to further the purposes underlying the Fourth Amendment's warrant requirement. An essential element of the Fourth Amendment's war-

rant clause is a finding of probable cause issued by a neutral and detached magistrate who is unfettered by the pressures associated with law enforcement. In rejecting the need for the issuance of a warrant based upon a showing of probable cause, the Court in *Skinner* stated:

> Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtlessly are well known covered empoyees. . . .
>
> [I]n light of the stnadardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate. *Skinner* 489 U.S. at , 109 S. Ct. at 1415–1416.

Furthermore, the Court found that imposing the warrant requirement would defeat the government's legitimate interests in conducting the search.

> We have recognized, moreover, that the Government's interest in dispensing with the warrant requirement is at its strongest when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search ("citing *Camara* V. *Municipal Court, Supra* 307 U.S. at 533. . . .")
>
> [I]mposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulation while significantly hindering and in many cases frustrating the objective of the Government's testing program.

Id. at 489 U.S. at , 109 C. St. at 1416.

In view of the similar requirements in the proposed legislation, clearly the Fourth Amendment's warrant requirement is inapplicable to drug and alcohol testing mandated by the proposed legislation.

Determining the reasonableness of a warrantless search in the absence of probable cause requires a careful balancing of the government's interest in protecting the safety of the traveling public against the intrusion into an individual employees' expectation of privacy.

The Proposed Program Fills a "Special Governmental Need" Vitiating the Individualized Suspicion Requirement.

Although a search may be performed without a warrant, the Court has generally required that the government have probable cause, to believe that the person searched has violated the law, see *New Jersey* v. *TLO,* 469 U.S. 324, 340 (1985). When the circumstances precluded a showing of probable cause the Court has usually required "some quantum of individualized suspicion" before concluding that a search is reasonable, see e.g. *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 560 (1976).

However, the Court has recognized that the probable cause standard is peculiarly related to criminal investigations. See, *Von*

Raab, 489 U.S. at ——, 109 S. Ct. at 1391. Certain other situations present "special needs" beyond the normal needs of law enforcement which may justify departures from the usual warrant and probable cause requirements.

The government's interest in ensuring that persons who are employed in safety-sensitive positions do so unimpaired by the effects of drugs or alcohol certainly fits within this category of "special needs". In these circumstances the Court has made it clear individualized suspicion is not required.

> [A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. . . . [W]here the privacy interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by the requirement of individualized suspicion, a search may be reasonable despite the abesence of such suspicion.

Skinner, 489 U.S. at , 109 S. Ct. at 1417. Furthermore, the Court noted that requiring an individualized suspicion requirement would only impede the government's dual objective of deterring drug and alcohol abuse and preventing significant loss of life and property that might occur before an employee shows any signs of impairment. See Skinner at 1416.

The program detailed in the proposed legislation fits within this special needs requirement. In the present context the search is not motivated by the government's desire to pursue criminal prosecutions (for example, the results of the tests are not turned over to law enforcement agencies). Rather the government's paramount concern is in protecting the traveling public from catastrophic accidents, not in arresting and prosecuting the covered employees.

Thus, in the absence of an individualized suspicion requirement, the reasonableness of the search depends upon balancing the intrusion it places on one's expectation of privacy against the government's interest in protecting the safety and welfare of its citizens.

The Program Imposes a Minimal Intrusion Given the Covered Employees' Diminished Expectations of Privacy.

In the employment context, the scope of an individual's privacy expectation has long been circumscribed by the employer's discretion to prescribe conditions of employment. As the Court noted in *O'Connor* v. *Ortega*, 480 U.S. 709 (1988), "operational realities of the workplace may render entirely reasonable certain work related intrusions by supervisors and co-workers that might be unreasonable in other contexts. An employee's expectation of privacy is diminished even further if he is employed in an industry that is the subject to pervasive regulation." Id. at 717.

A number of pre-*Skinner* decisions have upheld legislation which subjected individuals to physical intrusions where such intrusions were considered necessary to protect a compelling interest in public safety. See e.g. *Shoemaker* v. *Handel*, 795 F. 2d 1136 (3rd Cir. 1986), *cert denied*, 479 U.S. 986 (1986) (upholding random drug and alcohol testing of jockeys), and *Rushton* v. *Nebraska Public Power*

District, 844 F. 2d 562 (8th Cir. 1988) (upholding random toxicological testing of employees at a nuclear facility).

Skinner made it clear that transportation employees have diminished expectations of privacy. "[T]hese expectations . . . are diminished by reason of their participation in an industry that is pervasively regulated to ensure safety. . . ." *Skinner* at 1418. This pervasive regulation by both Federal and State government is found in all parts of the transportation industry. Employees engaged in safety-sensitive tasks within this industry are subject to a myriad of regulations pertaining to the use of drugs and alcohol.

Current FAA regulations prohibit persons from acting as crew members of civil aircraft within eight hours after consumption of any alcoholic beverage, while under the influence of alcohol, while using any drug that affects the persons' faculties in any way contrary to safety, or while having .04 or greater percent blood alcohol levels. (14 CFR section 91.11)

In addition, the FRA regulations challenged in *Skinner* (49 CFR section 219) prohibit railroad employees in safety-sensitive functions from using or possessing controlled substances or alcohol on the job and from reporting or remaining on duty while under the influence of alcohol or impaired by a controlled substance or alcohol or while having .04 percent or greater BAC. Given their responsibility for ensuring regulatory compliance, railroad companies are required to exercise a high degree of supervisory vigilance to prevent drug and alcohol use, possession, or impairment on the job. Railroad employees are deemed to have given their implied consent to reasonable cause drug and alcohol testing, including post-accident testing, and may be disqualified from service.

Similarly, with respect to commercial vehicles, under Section 12008 of Commercial Motor Vehicle Safety Act of 1986, any commercial driver who is deemed to be under the influence of drugs or alcohol while operating a commercial vehicle loses his license for a minimum of a year for the first time offense and permanently on the second offense. Additionally, the Federal Motor Carrier Safety regulations prohibit consumption of alcohol by a commercial driver four hours before the driver reports to duty as well as consumption or possession of alcohol or illegal drugs while on duty and operating while having a .04 BAC. (49 CFR sections 392.4, 392.15)

In light of transportation employees' already diminished expectation of privacy, the Court has found that the imposition of blood, breath, and urine tests does not constitute an unduly extensive imposition on an individual's privacy and bodily integrity.

In *Skinner* the Court discussed in detail the reasonableness of the intrusions imposed by the FRA regulations which required blood, breath, and urine tests.

> By and large, intrusions on privacy under FRA regulations are limited. To the extent transportation and like restrictions are necesary to procure the requisite blood, breath, and urine samples for testing, this interference alone is minimal given the employment context in which it takes place. Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go

> as they please during working hours. See e.g., *INS* v. *Delgado* 416 U.S. at 218.
>
> Any additional interference with a railroad employees' freedom of movement that occurs in the time it takes to produce a blood, breath, or urine sample for testing, by itself, cannot be said to infringe significantly privacy interests.

Skinner at 1417.

Citing the Court's decision in *Schmerber* v. *California,* 4 U.S. 757 (1966), upholding a State's right to draw a blood sample from a motorist suspected of driving while intoxicated, the Court found the blood tests posed a limited intrusion:

> [T]he tests are commonplace in these days of periodic physcial examinations and experience with them teaches that the quantity of blood extracted is minimal and that for most part the procedure involves virtually no risk, trauma or pain. *Schmerber* at 771.

Further, the Court found that breath tests were even less intrusive than the blood tests since they do not require the piercing of the skin and can be conducted outside the hospital environment.

While the Court found certain aspects of the urine test to be troublesome, it nevertheless concluded that "like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use." *Skinner* at 1418.

> We recognize, however, that the procedures for collecting samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not indicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we noted that the regulations endeavor to reduce the intrusiveness of the collection process.
>
> The regulations do not require that samples be furnished under direct observation of a monitor. . . . The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is not unlike similar procedures encountered often in the context of a regular physical examination.
>
> More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is pervasively regulated, to ensure safety, a goal dependent in substantial portion to the health and fitness of the covered employees. Id. at 1418.

In weighing the covered employees' limited expectation of privacy, against what the Court held to be a minimal intrusion imposed upon them by the government, the government's interest in preventing potentially catastrophic accidents tilts the scales decidedly in the government's favor. Therefore, in light of the dangers posed by a substance-impaired employee, the *Skinner* court found the Government's interest promoted by testing to be compelling. *Skinner* described this interest as preventing improper "discharge of

duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner* at 1419. The *Skinner* court further stated that "a substance-impaired employee in a safety sensitive job can cause great human loss before any signs of impairment become noticeable." *Supra.*

B. THE STATE OF THE LAW AND THE PROPOSED LEGISLATION

Since its decision in *Skinner,* the Court has denied certiorari in two cases which challenged the constitutionality of random drug tests. See *Policemen's Benevolent Association* v. *Township of Washington,* 850 F. 2d 133 (2d Cir., 1988) *cert. denied,* No. 88-706 (U.S. April 1988) (upholding random testing of police officers) and *Alverado* v. *Washington Public Power Supply System* 759 P. 2d 427 (Wash. 1988) cert. denied No. 88-645 (U.S. April 3, 1988) (upholding mandatory random testing program for employees at nuclear power plants).

Following the Court's lead in *Skinner* and *Von Raab,* the D.C. Circuit has recently upheld the Department of Defense's (DOD's) practice of subjecting certain of its civilian employees (including civilian pilots, aircraft mechanics, and air traffic controllers) to compulsory, random toxicological urine testing, see *National Federation of Federal Employees,* v. *Cheney,* No. 88-5080 (D.C. Cir. Aug. 29, 1989). The D.C. Circuit has also upheld DOT's internal testing program, including air traffic controllers and other transportation safety related personnel, which also included random drug and alcohol testing. See *America Federation of Government Employees,* v. *Skinner,* No. 87-5417 (D.C. Cir. Sept. 8, 1988). See also *Harmon* v. *Thornburgh,* No. 88-5265 (D.C. Cir. June 30, 1989) (upholding random drug testing for Justice Department employees); *Transport Workers Union, Local 234* v. *Southeastern Pennsylvania Transportation Authority,* 863 F. 2d 1110 (3d. Cir. 1988), vacated and remanded, 109 S. Ct. 3209 (1989), aff'd on remand sub nom.; *United Transportation Union et al.* v. *Southeastern Pennsylvania Transportation Authority* Nos. 88-1163 and 88-1208 (3d Cir. filed Sept. 1, 1989) (upholding random drug testing and alcohol testing of mass transit employees).

These decisions follow the rationale of the *Skinner* and *Von Raab* and expand upon it. The *Skinner* court had upheld suspicionless testing in an industry whose employees had a history of drug and alcohol abuse. The decisions handed down by the Court of Appeals for the District of Columbia upheld testing even though there was no documented history of substance abuse in DOD. Even though the DOD program included purely random testing, the Court felt that the program was stiil reasonable. Relying on *Skinner* and *Von Raab,* the Court concluded that "the random nature of the subject testing plan is relevant but does not require us to undertake a fundamentally different analysis." *National Federation of Federal Employees* at , citing *Harmon, supra.* Subsequent decisions at the district court level have gone even further in supporting testing in the absence of a reasonable suspicion. A recent decision from the U.S. District Court for the District of Columbia upheld random testing of urban mass transit employees. *Amalgamated Transit Union* v.

Skinner, No. 88-3642 (D.C. Cir. Sept. 21, 1989). In this case, in light of the ruling by the Circuit Court in *Harmon*, the plantiffs dropped their Fourth Amendment challenge and opted to challenge the program on statutory grounds.

Therefore, it appears that future challenges to random testing programs will focus not on the constitutionality of the random search but rather on the government's compelling interest in including a particular category of employees. Since this particular legislation is narrowly tailored to include only those engaged in tasks which have a direct relation to public safety, the Committee believes that the legislation will withstand any and all constitutional challenges.

The proposed legislation statutorily requires the Secretary of Transportation, the Federal Aviation Administrator, and the Federal Railroad Administrator to publish regulations regarding drug and alcohol testing procedures. Assuming employees are:

(1) informed that a random drug testing program will be established;

(2) provided an opportunity to be heard prior to completion of the rulemaking;

(3) not subjected to direct surveillance while producing a specimen for the test;

(4) chosen for random tests by a nondiscriminatory and impartial method; and

(5) given a second high-quality confirmatory test for all positive screening tests,

the test procedure should ensure that the individual's due process rights are respected. Also, the Committee affirms existing mechanisms in law or agreement through which employees may have an opportunity to challenge testing procedures or proposed disciplinary actions resulting from testing. It is the Committee's expectation that the Secretary will address the question of hearing opportunities for effected individuals.

In conclusion, the Committee recognizes that individuals are protected from unreasonable searches and seizures. However, the Committee recognizes that a paramount interest exists in ensuring that transportation personnel entrusted with safety-sensitive responsibilities remain free from the effects of illegal drug use and alcohol abuse. The public trust in the country's transportation system must not be compromised. With regulations to protect the individual's due process rights, any intrusion deemed to occur from the proposed testing methods is reasonable in view of the governmental goals to be furthered by this legislation.

Legislative History

On March 9, 1989, Senator Hollings introduced S. 561, legislation to require drug and alcohol testing in the rail, aviation, and motor carrier industries. The bill is cosponsored by Senators Danforth, Exon, Breaux, Burns, Gorton, Lott, Bond, Boschwitz, Coats, D'Amato, DeConcini, Dole, Gramm, Lugar, Mikulski, McCain, McConnell, Grassley, Helms, Sarbanes, Wallop, Warner, Wilson, Chafee, Simpson, and Thurmond.

As introduced, S. 561 was virtually identical to S. 1041, legislation introduced in the 100th Congress, reported by the Committee on a vote of 19–1, and adopted by the Senate on two separate occasions. Senate action during the 100th Congress included adoption of testing provisions as an amendment to H.R. 3051, the Air Passenger Protection Act, and as part of H.R. 5210, the Senate's omnibus drug bill at the end of the Congress. Neither provision ultimately was enacted into law. No agreement was reached in conference on the aviation consumer bill and differences with the House over mandatory rehabilitation for workers who test positive, and over whether there should be testing in the aviation and motor carrier industries, resulted in deletion of the Senate's testing provisions from the final drug bill.

The Commerce Committee has held a number of hearings during the 99th, 100th, and 101st Congresses on the need for legislation to combat drug and alcohol abuse in the transportation industries. The most recent of these hearings, chaired by Senator Hollings on June 15 of this year, was on S. 561 and included testimony by the Secretary and representatives of industry, labor, and public interest groups.

On August 1, 1989, the Committee met in open executive session to consider an amendment in the nature of a substitute offered by Senator Hollings to the original text of S. 561. Without objection, the Committee ordered the amended bill to be reported favorably.

Summary of Major Provisions

The bill would require the Secretary to issue rules within 12 months of enactment for aviation, rail, and motor carrier drug and alcohol testing and rehabilitation programs.

A. Aviation

1. The FAA Administrator would be required to prescribe regulations to require commercial air carriers and the FAA to conduct pre-employment, reasonable suspicion, random, and post-accident testing. The Administrator also would be authorized to require periodic recurring drug and alcohol testing in conjunction with required physical examinations. Employees covered include flight crews, flight attendants, mechanics, air traffic controllers, and airport screening contract personnel, as well as any other airline employees responsible for safety-sensitive functions, as determined by the Secretary.

2. The Administrator would have discretion to suspend or revoke the certificate of any individual testing positive for the unlawful use of alcohol or a controlled substance, or to disqualify or dismiss such an individual.

3. No individual who tests positive shall be allowed to return to his or her position unless he or she completes a program of rehabilitation. If an individual tests positive and refuses to undertake a rehabilitation program, fails to complete a rehabilitation program, or has completed a rehabilitation program and tests positive again, or used alcohol or drugs while on the job, he or she will be prohibited from returning to his or her safety-sensitive position.

4. The Administrator shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. Air carriers are not prohibited from establishing rehabilitation programs in cooperation with other air carriers.

5. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

6. Inconsistent State and local laws would be preempted and existing DOT testing regulations would continue in force until implementation of the requirements of this legislation.

B. Railroads

1. The Secretary would be required to prescribe regulations to require railroads to conduct pre-employment, reasonable suspicion, random, and post-accident testing. The Secretary also would be authorized to require periodic recurring drug and alcohol testing in conjunction with required physical examinations. Railroad employees covered include those responsible for safety-sensitive functions, as determined by the Secretary. Existing FRA testing requirements include employees covered by the Hours of Service Act (this includes employees in train and engine service, dispatchers, operators, signal maintainers and some yard masters).

2. The Secretary shall consider disqualification or dismissal of any employee determined to have used or been impaired by alcohol while on duty and to have used a controlled substance, whether on duty or not, except for medical purposes.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol. This would not result in a change in current programs in the rail industry which provide rehabilitation without disciplinary action when employees step forward on their own initiative or are referred to rehabilitation by a coworker. Railroads are not precluded from establishing rehabilitation programs in cooperation with other railroads.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory, certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

5. Inconsistent State laws would be preempted, as under current Federal law and existing DOT regulations would continue in force until implementation of the requirements of this legislation.

C. Motor Carriers

1. The Secretary would be required to prescribe regulations to require motor carriers to conduct pre-employment, reasonable suspicion, random, and post-accident testing. The Secretary also would be authorized to require periodic recurring drug and alcohol testing in conjunction with required physical examinations. Operators of commercial motor vehicles not subject to motor carrier conducted testing also would be tested under these provisions. Post-accident testing would be required where there is a fatality or other serious accident involving bodily injury or significant property damage.

2. Operators would be subject to the penalties applicable under the Commercial Motor Vehicle Safety Act of 1986, which provide that a driver is disqualified from operating a commercial motor vehicle for a period of not less than one year if found to have operated such a vehicle while under the influence of alcohol or a controlled substance, and is disqualified for life if there is more than one such violation of driving while under the influence. The Secretary would be given discretion under this legislation to determine appropriate penalties for operators who are determined to have unlawfully used, but who were not under the influence of, alcohol or a controlled substance.

3. The Secretary shall set forth requirements for rehabilitation programs for the identification and opportunity for treatment of employees in need of assistance in resolving problems with drugs or alcohol and determine the circumstances under which operators shall be required to participate in such programs. Motor carriers are not precluded from establishing rehabilitation programs in cooperation with other motor carriers.

4. Any testing program would be required to include procedures to protect individual privacy, incorporate laboratory certification and testing procedures developed by HHS and DOT, require that all laboratories involved in testing for drugs have the capability of performing screening and confirmation tests at such laboratory, require confirmation of all positive screening tests, provide for the subdivision of specimens and the opportunity for an independent test of positive samples, provide for confidentiality of test results and medical histories, and ensure that employees are selected for tests by nondiscriminatory and impartial methods.

5. Inconsistent State and local laws would be preempted and existing DOT regulations would continue in force until implementation of the requirements of this legislation.

6. The Secretary would be required to design and implement, in four interested and representational States, a pilot program for random testing of the operators of commercial motor vehicles. $5,000,000 from funds for fiscal year 1990 under the Motor Carrier Safety Assistance Program would be available for carrying out this pilot program. This addresses a situation unique to the motor carrier industry and would provide the basis for a report to Congress on the effectiveness of such a program in identifying individuals, such

as owner-operators, who might avoid detection through the carrier-administered testing established under this legislation.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 8, 1989.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 561, the Transportation Employee Testing Act of 1989, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, August 1, 1989.

S. 561 would amend legislation governing commercial aviation, rail and motor carriers to require employers to test employees for drugs and alcohol and to offer employees opportunities to participate in rehabilitation programs. The Department of Transportation (DOT) currently has regulations in place that require such testing for drugs, but these regulations do not require alcohol testing. CBO estimates that enactment of this bill would result in one-time costs to the federal government of $1 million to $3 million, mostly in 1990, and recurring costs of $2 million to $5 million annually thereafter, assuming appropriation of the necessary funds. Local governments would also incur additional costs totaling $15 million to $20 million a year for drug and alcohol testing of vehicle drivers they employ.

Federal costs: The bill would direct the FAA to issue regulations requiring air carriers to conduct pre-employment, reasonable suspicion and random testing of airline employees in safety-sensitive positions. In addition, S. 561 would require testing after serious accidents. The DOT would be directed to require similar testing for commercial motor vehicle operators and railroad employees responsible for safety-sensitive functions.

The DOT would incur some costs for developing, implementing and enforcing new regulations governing testing of airline, railroad and motor carrier employees. Assuming enactment by early in fiscal year 1990. CBO expects that the cost of developing and implementing new regulations would be $1 million to $3 million, primarily in fiscal year 1990. The DOT would also incur costs for enforcement of the new testing requirements. While CBO lacks sufficient information to estimate these costs with precision, additional enforcement efforts could cost several million dollars annually, depending on the degree of enforcement desired.

In addition, the FAA would be required to implement such a testing program for its own workers who perform safety-sensitive functions and to offer its employees opportunities to participate in rehabilitation programs. The FAA already conducts drug testing of

all safety-sensitive employees, but does not perform alcohol testing. Costs to the federal government to conduct alcohol testing of all safety-sensitive employees would depend primarily on the type of test used. Based on information provided by the DOT, CBO estimates that any additional costs would likely be less than $1 million annually.

The Secretary also would be required to design and implement a pilot program for random testing of commercial motor vehicle operators, with the participation of four states. The bill would set aside $5 million from funds already made available for Motor Carrier Safety Grants in fiscal year 1990 for this pilot program. The Anti-Drug Abuse Act of 1986 provided budget authority of $60 million for these grants in fiscal year 1990.

State and local costs: S. 561 would amend the Commercial Motor Vehicle Safety Act of 1986 to include a new section on drug testing. The bill would require testing of the operators of commercial motor vehicles, as defined by that act. While current regulations apply only to drivers of motor vehicles in interstate commerce, this provision would extend coverage of federal drug-testing requirements to intrastate drivers, including those operated directly by or under contract for local governments. Included would be operators of school buses, transit buses, sanitation trucks and road maintenance trucks. In addition, S. 561 would require testing of such drivers for alcohol.

The testing requirement of S. 561 would apply to approximately 500,000 local government employees—primarily drivers of school buses, transit buses, and garbage trucks. Transit bus drivers are currently covered by regulations of the Urban Mass Transportation Administration that require drug, but not alcohol, testing. The additional cost to local governments to comply with S. 561 would depend on the type of alcohol test performed and on the number of drivers tested. We estimate that the cost would be $15 million to $20 million per year, assuming that random tests would reach 50 percent of the relevant drivers each year, which is the level required by current DOT regulations for interstate drivers. In addition to testing, local governments might also incur costs for litigation relating to collective bargaining and constitutional issues, and could bear some costs for rehabilitation programs.

State governments also operate some heavy vehicles, and therefore would incur some increased costs if this bill is enacted. CBO estimates that such state costs would not be significant, because the number of drivers affected would be much smaller than for local governments. Some costs initially borne by local governments, however, might be reimbursed by the states.

States may eventually bear some of the financial burden of testing privately-employed truck drivers, as well, but this is very uncertain, and would partially depend on the results of the pilot program discussed above. One option to implement random testing of motor carrier operators would be to include testing as part of ongoing roadside inspections conducted by state governments. These inspections are primarily funded by the federal government, through the Motor Carrier Safety Assistance Program (MCSAP). The DOT might require states to conduct these drug tests as a condition of receiving MCSAP funds, and it is possible that some states might

drop out of the program as a result. Some interest groups have called for inclusion of random testing in roadside inspections to fulfill existing testing requirements. We cannot predict if DOT will choose to implement random testing of motor carriers in this way or in some other way that would involve state governments, nor can we predict how states would respond to such a change.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mitchell Rosenfeld and Marjorie Miller, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This legislation covers several modes of commercial transportation, each affecting varying numbers of employees. In aviation, the Committee estimates that approximately 538,000 domestic air carrier employees and FAA air traffic controllers will be covered by this legislation. The Committee estimates that in the railroad industry, approximately 90,000 individuals will be affected by this legislation. Finally, approximately 5½ million individuals employed as operators of commercial motor vehicles will be covered by the legislation.

ECONOMIC IMPACT

The major areas of economic impact upon the FAA and the respective transportation industries include testing costs, rehabilitation program costs, and employee assistance program costs. Generally, these costs are applicable to each of the three modes of transportation. They, however, will vary according to the number of affected employees, the frequency in which they are tested, and the number of employees in need of rehabilitation. Total transportation sector costs are difficult to estimate, because the bill does not establish a minimum number of times any individual or class of employees must be tested, or require rehabilitation for employees who test positive.

Preliminary figures have placed the cost of initial screening and confirmatory tests, as well as the related administrative costs, at between $23–$100 per employee, depending on the type of test used, the number of drugs tested, and the sensitivity of the test. In addition, testing costs can often be reduced through the joint purchasing power of trade associations or other organizations. Similarly, as testing becomes more widespread, it is possible the cost of testing will be lowered by the new volumes of testing required.

Rehabilitation program costs vary considerably based upon the type, location, and length of the program. Employee assistance program costs associated with the education, counseling, and training

of employees after rehabilitation are estimated to be $20–$30 per employee.

PRIVACY

Testing of transportation employees in safety-sensitive positions will create an intrusion into the privacy of these individuals, which the Committee believes is justified, given the overwhelming public interest in safe transportation, and which is constitutional, given the scope of the problem, the safeguards in the legislation, and the diminished expectation of privacy of safety-sensitive employees.

PAPERWORK

With respect to paperwork requirements, the Committee recognizes that compliance with the regulations to be promulgated pursuant to this legislation potentially could be significant assuming that carriers will be required to certify to the Secretary that their testing and rehabilitation programs are operative and being properly administered, and that testing safeguards are being adhered to. This legislation is not expected to impose substantial reporting requirements beyond those that are anticipated under DOT's current testing regulations. The Committee expects, whether through statutory or administrative requirements for testing, that the Secretary will seek to minimize additional paperwork requirements wherever possible, through "piggyback" reporting, random auditing, or other appropriate methods.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section states that the short title of the bill as reported is the "Transportation Employee Testing Act of 1989."

SECTION 2.—FINDINGS

This section contains the statement of Congressional findings emphasizing the need to eliminate alcohol abuse and illegal drug use throughout the country, and in particular, among those who are responsible for the safe movement of aircraft, trains, and commercial motor carriers. In this regard, increased testing, including the use of random testing, has been found successful in deterring the continued abuse of alcohol and drug use. Congress also finds that safeguards can be implemented to protect individual privacy, reduce the potential for harassment, and ensure against undue harm to a person's reputation or career. Finally, there is a recognition that rehabilitation is an important part of any testing program and should be made available, as appropriate.

SECTION 3.—TESTING TO ENHANCE AVIATION SAFETY

Section 3 of the bill would create a new section 613 in the Federal Aviation Act of 1958. New subsection (a)(1) of section 613 in the Federal Aviation Act of 1958. New subsection (a)(1) of section 613 would require, within 12 months after enactment, the Administrator of the FAA to issue regulations requiring air carriers and foreign air carriers to conduct preemployment, reasonable suspicion,

random, and post-accident testing of airmen, crew members, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator) for use of alcohol or a controlled substance in violation of law or Federal regulation. The Administrator is also authorized to issue regulations for the conduct of periodic recurring testing of safety-sensitive employees for such use.

The alcohol and drug testing programs to be established under this subsection of Section 613 would apply to major domestic airlines, as well as commuter air carriers, air taxis, and certain fixed base operations, such as tour flights. Coverage does not extend to operators of general aviation aircraft or to other aircraft privately owned or operated and not held out for business. With respect to foreign air carriers, the bill is designed to cover those airlines that provide service to and from the United States. As provided in a later section, these testing requirements are to be consistent with the international obligations of the United States, with consideration given to any applicable laws and regulations of the foreign nation. The Committee believes that, while there may be difficulties in implementation, it is necessary to ensure the testing of those individuals employed by foreign carriers who are responsible for the safety of U.S. citizens. To require the testing of these individuals, within the realities of international treaties, is important to the Committee's efforts to enhance aviation safety.

The bill would mandate the testing of a number of categories of employees, as well as those selected by the Administrator because of their employment in safety-sensitive positions. Those groups of employees required to be covered by the new testing programs include airmen, crew members, and airport security screening contract personnel. As defined in statute and regulation, this would require testing of the flight crews, flight attendants, air traffic controllers, mechanics, safety inspectors, and flight dispatchers. The Committee intends that the Administrator be very selective in extending the coverage of this provision to other categories of air carrier and FAA employees. While it is critical that, in the interest of safety, personnel responsible for the safety of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, section 613 should not be treated as an open authorization to test all aviation industry employees.

This subsection of section 613 also specifies the conditions under which employees must be tested. Pre-employment and post-accident testing are self-evident. Testing will also be required when there is reasonable suspicion to believe that an individual is currently under the influence or impaired by alcohol or a controlled substance. Reasonable suspicion, as envisioned by this bill, does not require a showing of probable cause, as that term is typically defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that under the current FAA rule which requires specific, personal observations concerning the appearance, behavior, or performance of the employee.

With respect to random testing, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Administrator

the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Administrator should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of alcohol abuse and the use of illegal drugs by safety-sensitive employees. Finally, as is noted in subsection (d) of new section 613, relating to testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The bill as reported authorizes, but does not require, the Administrator to mandate testing on a periodic recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the airline industry. However, in order to provide the Administrator with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic recurring basis.

New subsection (a)(2) requires the administrator to establish a program of testing for FAA employees whose duties include responsibility for safety-sensitive functions. Such a program is required to include pre-employment, reasonable suspicion, random, and post-accident testing for use of alcohol or a controlled substance in violation of law or Federal regulation. The Administrator is also authorized to issue regulations for the conduct of periodic recurring testing of safety-sensitive FAA employees for such use.

New subsection (a)(3) requires that in prescribing regulations, the Administrator shall require, as the Administrator considers appropriate, the suspension or revocation of any certificate, or the disqualification or dismissal of an individual, in any instance where an individual has been tested and confirmed to have used alcohol or a controlled substance in violation of law or Federal regulations. This subsection is designed to provide the Administrator with the authority to sanction individual employees on a discretionary basis. It would not require that any employee who tests positive for drug or alcohol use necessarily be dismissed or have his or her certificate revoked. Rather, it would allow the Administrator to take such a step directly, or to require an air carrier to do so, if such action were believed warranted by the Administrator.

New subsection (b)(1) would prohibit the use of alcohol or a controlled substance by such individuals as stated in subsection (a)(1) in violation of law or Federal regulation. This affirmative prohibition is intended to clarify that individuals in safety-sensitive positions are prohibited from using alcohol or a controlled substance in a manner that violates law or Federal regulation.

New subsection (b)(2) prohibits any such individual who is determined to have used alcohol or a controlled substance in violation of law or Federal regulation from serving in a safety-sensitive position unless that individual has completed a program of rehabilitation described in proposed subsection (c) of section 613. This provision does not mandate that every individual who tests positive be

admitted into such rehabilitation programs. If a carrier chooses to do so, it can remove an employee who tests positive from that safety-sensitive position. However, this proposed subsection would prohibit an individual who tests positive from returning to his or her safety-sensitive position unless he or she had completed a program of rehabilitation. The objective of this provision is to keep employees from returning to positions of critical importance unless they have successfully completed a program designed to end their abuse of illegal drugs or alcohol.

New subsection (b)(3) prohibits any such individual who is determined to have used alcohol or a controlled substance in violation of law or Federal regulation from returning to his or her safety-sensitive position if such individual (A) engaged in such use while on duty; (B) had previously undertaken or completed a program of rehabilitation described in new subsection (c); (C) refuses to undertake such a rehabilitation program; or (D) fails to complete a rehabilitation program. This provision is explicitly intended to preclude employees serving in a safety-sensitive position who test positive while on duty from returning to that position. It would also prohibit employees who refuse to undertake a rehabilitation program, fail to complete such a program, or who test positive for a second time, from returning to their safety-sensitive positions.

New subsection (c)(1) requires the Administrator to issue regulations setting forth requirements for rehabilitation programs which, at a minimum, provide for the identification and opportunity for treatment of employees referred to in new subsection (a)(1) in need of assistance in resolving problems with the use of alcohol or controlled substances. Each carrier is encouraged under this subsection to make such a program available to all of its employees, in addition to those safety-sensitive employees identified in subsection (a)(1). The Administrator is directed to determine the circumstances under which such safety-sensitive employees shall be required to participate in such a rehabilitation program. Nothing in this subsection precludes any air carrier or foreign air carrier from establishing a rehabilitation program in cooperation with other air carriers or foreign air carriers.

New subsection (c)(2) requires the Administrator to establish and maintain a rehabilitation program, which at a minimum, provides for the identification and opportunity for treatment of FAA employees whose duties include direct responsibility for safety-sensitive functions and who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (d) requires the Administrator, in establishing a testing program under new subsection (a) of section 613, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. Promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. Incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which (A) establish comprehensive standards for all aspects of laboratory controlled substances testing and procedures to be applied in carrying out new section 613, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establishing the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for the certification and revocation of certification of laboratories to perform controlled substances testing in carrying out section 613;

3. Require that all laboratories involved in the controlled substances testing of any individual under section 613 shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. Provide that all tests which indicate the use of alcohol or a controlled substance by an individual, in violation of law or Federal regulation, shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

5. Provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests such an independent test within three days after being advised of the results of the confirmation test;

6. Ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. Provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriation sanctions under new section 613; and

8. Ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the

basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no respect of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as proposed by this bill and as DOT has done in 49 CFR part 40 as it exists at this writing, is an essential component of the procedural safeguards specified in new subsection (d). Realizing that these guidelines are possibly subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect be mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends for testing for alcohol to be conducted according to regulations to be developed by the Administrator in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and shall provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life.

Among the employee safeguards included in subsection (d) is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the bill as reported directs that a portion of each sample be retained as a control in case any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with an opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary,

except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Administrtor will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosures of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (e)(1) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under new section 613, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or resrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Administrator to ensure effective implementation of this new section, and therefore the Committee is acting to preempt those restrictions.

New subsection (e)(2) states that nothing in section 613 shall be construed to restrict the discretion of the Administrator to continue in force, amend, or further supplement any regulations issued before the date of enactment of the section that governs the use of alcohol and controlled substances by those safety-sensitive individuals specified in new subsection (a)(1). These include, but are not limited to, rules prohibiting drug and alcohol use, prescribing alcohol and drug testing requirements, and establishing employee assistance and rehabilitation programs.

New subsection (e)(3) directs the Administrator in prescribing regulations under the section to only establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States. The Administrator is further directed to take into consideration any applicable laws and regulations of foreign countries. The Secretary of State and Secretary of Transportation, jointly, shall call on the member nations of the International Civil Aviation Organization to strengthen and enforce existing standards to prohibit the use of alcohol or a controlled substance in violation of law or Federal regulation by crew members in international civil aviation.

New subsection (f) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act specified by the Administrator. The Committee is aware that the Controlled Substances Act covers hundreds of

drugs, thus making it practically and financially difficult to administer testing programs of all drugs on a widespread basis. The intention of this provision is to provide the Administrator with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this section.

Section 3(b) of the reported bill makes changes to the table of contents of the Federal Aviation Act of 1958.

SECTION 4.—TESTING TO ENHANCE RAILROAD SAFETY

Section 4 of the bill as reported amends section 202 of the Federal Railroad Safety Act of 1970. New subsection (r)(1) of section 202 would require, within 12 months after enactment, the Secretary to issue rules, regulations, standards, and orders relating to alcohol and drug use in railroad operations. Such regulations shall establish a program which (A) requires railroads to conduct preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions (as determined by the Secretary) for use of alcohol or a controlled substance in violation of law or Federal regulations; (B) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and (C) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law and any rules, regulations, standards, or orders issued under the Act. These provisions are designed to provide the Secretary with the authority to sanction individual employees on a discretionary basis. The bill would not require that any employee who tests positive for drug or alcohol use necessarily be dismissed or disqualified on by either the Secretary or the railroad. Rather, it would allow the Secretary to take such a step directly, or to require a railroad to do so, if such action were believed warranted by the Secretary.

The Secretary is also authorized under this new subsection to issue rules, regulations, standards, and orders requiring railroads to conduct periodic recurring testing of safety-sensitive railroad employees for use of alcohol or a controlled substance in violation of law or Federal regulation.

Nothing in this subsection is to be construed as restricting the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulations, standards, and orders issued before the date of enactment of the subsection that govern the use of alcohol and controlled substances in railroad operations. These include, but are not limited to, rules prohibiting drug and alcohol use, prescribing alcohol and drug testing requirements, and establishing employee assistance and rehabilitation programs.

This new subsection also specifies the conditions under which employees must be tested. Pre-employment and post-accident testing are self-evident. Testing will also be required when there is reasonable suspicion to believe that an individual is currently under the influence or impaired by alcohol or a controlled substance. Rea-

sonable suspicion, as envisioned by this bill, does not require a showing of probable cause, as that term is typically defined in a legal sense. Rather, the Committee anticipates the continuation of reasonable suspicion testing currently conducted by the FRA, which requires specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee.

With respect to random testing in the railroad industry, as in the aviation and motor carrier industries, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Secretary the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and the likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of alcohol abuse and the use of illegal drugs by safety-sensitive employees. Finally, as is noted in new subsection (r)(2), relating to testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The reported bill authorizes, but does not require, the Secretary to mandate testing on a periodic recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the railroad industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic recurring basis.

New subsection (r)(2) requires the Secretary, in establishing a testing program under the subsection, to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. Promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. Incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which (A) establishes comprehensive standards for all aspects of laboratory controlled substances testing and procedures to be applied in carrying out the subsection, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out the subsection;

3. Require that all laboratories involved in the controlled substances testing of any individual under the subsection shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. Provide that all tests which indicate the use of alcohol or a controlled substance by any individual, in violation of law or Federal regulation, shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

5. Provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests such an independent test within 3 days after being advised of the results of the confirmation test;

6. Ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. Provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under the subsection; and

8. Ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to carefully review the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as proposed by this bill and as DOT has done in 49 CFR part 40 as it exists at this writing, is an essential component of the procedural safeguards specified in new subsection (r)(2). Realizing that these guide-

lines are possibly subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect be mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends for testing for alcohol to be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and shall provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life.

Among the employee safeguards included in subsection (r)(2) is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the bill as reported directs that a portion of each sample be retained as a control in case any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with an opportunity, within a specified time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (r)(3) requires the Secretary to issue rules, regulations, standards, or orders setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of railroad employees resonsible for safety-sensitive functions (as determined by the Secretary) in need of assistance in resolving problems with the use of alcohol or a controlled substance. Each railroad is encouraged to make such a program available to all of its employees in addition to those responsible for safety-sensitive functions. The Secretary is directed to determine the circumstances under which such safety-sensitive employees shall be required to participate in such a rehabilitation program. Nothing in subsection (r)(3) shall preclude a railroad from establishing a program under that subsection in cooperation with any other railroad.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (r)(4) requires the Secretary, in carrying out the provisions of subsection (r), to establish only requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations of foreign countries.

New subsection (r)(5) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act specified by the Secretary. The Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under new subsection (r).

Finally, the Committee reaffirms provisions in current law which provide that no State shall adopt or have in effect any law, rule, regulation, order, or standard that is incompatible with the regulations promulgated under the Federal Railroad Safety Act of 1970, including the amendments provided for in this bill. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of this section, and therefore the Committee reaffirms the provisions of current law which would serve to preempt such state or local government restrictions. As in other sections of this legislation, the Committee does not intend for this to preempt provisions of State criminal law which imose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property.

SECTION 5.—TESTING TO ENHANCE MOTOR CARRIER SAFETY

Section 5 of the bill would create a new section 12020 of the Commercial Motor Vehicle Safety Act of 1986. Subsection (a) of new section 12020 would require, within 12 months after enactment, the Secretary to issue regulations requiring motor carriers to conduct pre-employment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for the use of alcohol or a controlled substance in violation of law or Federal regulation. The Secretary is also authorized to issue regulations for the conduct of periodic recurring testing of such operators for such use.

The bill limits testing to operators only. For purposes of this bill, a commercial motor vehicle is defined as it is in the Commercial Motor Vehicle Safety Act of 1986. As was contemplated under the provisions of that Act, this term could include trucks and buses operated by municipalities and States.

This subsection also specifies the conditions under which operators must be tested. Pre-employment testing is self-evident. Testing will also be required when there is reasonable suspicion to believe that an individual is currently under the influence or impaired by alcohol or a controlled substance. Reasonable suspicion as envisioned by this bill does not require a showing of probable cause as that term is typically defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that conducted under the current Federal Highway Administration rule which requires specific, personal observations concerning the appearance or conduct of a commercial motor vehicle driver.

With respect to random testing, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to leave it to the Secretary to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of drug and alcohol abuse by motor carrier operators. Finally, as is noted in new subsection (d), on testing safeguards, it is critical that whatever means is chosen to randomly select employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The bill as reported authorizes, but does not require, the Secretary to mandate testing on a periodic recurring basis. The Committee believes that a vigorous random testing program will provide an adequate deterrence against alcohol abuse and illegal drug use in the motor carrier industry. However, in order to provide the Secretary with the greatest degree of flexibility in addressing the drug and alcohol problem, the Committee has provided the authority to issue regulations relating to the testing of safety-sensitive employees on a periodic recurring basis.

New subsection (b)(1) provides that post-accident testing shall be required in the case of any accident in which occurs loss of human

life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a motor carrier. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted.

New subsection (b)(2) states that the Secretary is not precluded from providing that testing be conducted as part of the biennial medical examination required of the operators of commercial motor vehicles for Federal certification.

New subsection (c) requires the Secretary to promulgate regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used alcohol or a controlled substance in violation of law or Federal regulation. The Secretary is directed to determine the circumstances under which an operator shall be required to participate in such a program before that person can be authorized to operate a motor vehicle subsequent to being found in violation of such law or Federal regulation. Nothing in this subsection shall preclude a motor carrier from establishing a rehabilitation program in cooperation with another motor carrier.

While the legislation does not specify the conditions under which an individual may enter a rehabilitation program, the Committee favors a program which employees enter on a voluntary basis prior to being identified by a positive drug or alcohol test. This type of approach currently exists in a number of employee assistance programs in the rail industry, and the Committee strongly supports this approach as preferable to a situation in which rehabilitation is guaranteed to any employee who tests positive.

New subsection (d) requires the Secretary, in establishing a testing program under new subsection (a), to develop procedures designed to safeguard individual rights and testing procedures which shall:

1. Promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

2. Incorporate HHS scientific and technical guidelines relating to laboratory standards and testing procedures dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which (A) establish comprehensive standards for all aspects of laboratory controlled substances testing and procedures to be applied in carrying out new section 12020, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing; (B) establish the minimum list of controlled substances for which individuals may be tested; and (C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing carrying out new section 12020;

3. Require that all laboratories involved in the controlled substances testing of any individual under the section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

4. Provide that all tests which indicate the use of alcohol or a controlled substance by any individual, in violation of law or Federal regulation, shall be confirmed by a scientifically recognized method of testing capable or providing quantitative data regarding alcohol or a controlled substance;

5. Provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event that the individual's confirmation test results are positive, the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests such an independent test within 3 days after being advised of the results of the confirmation test;

6. Ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with HHS;

7. Provide for the confidentiality of employee test results and medical information (other than information relating to alcohol or a controlled substance), with the exception of the use of test results for the orderly imposition of appropriate sanctions under the section; and

8. Ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence of a controlled substance in violation of law or Federal regulation shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Incorporating the HHS guidelines relating to laboratory standards and procedures for testing controlled substances, as provided by this bill and as DOT has done in 49 CFR part 40 as it exists at this writing, is an essential component of the procedural safeguards specified in this subsection. Realizing that these guidelines

are possibly subject to future modification, the Committee has acted to specify that the basic elements of certain provisions now in effect be mandated, including the need for comprehensive standards and procedures for all aspects of laboratory testing of drugs, the establishment of a minimum list of controlled substances for which employees may be tested, the establishment of standards and procedures for the periodic review of laboratories, and the development of criteria for laboratory certification or revocation of such certification.

The Committee intends for testing for alcohol to be conducted according to regulations to be developed by the Secretary in consultation with HHS. Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current BAC of the individual, and shall provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at the employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute, given the impact testing can have on an individual's career and life.

Among the employee safeguards included in new subsection (d) is the requirement that samples be subdivided and retained for possible future use. To ensure complete protection of those employees tested, the bill as reported directs that a portion of each sample be retained as a control in case any question should arise with respect to the proper identification and chain of custody of that sample. Such a retained specimen then will provide the individual with the opportunity, within a specific time period, to obtain an independent confirmation test at a second certified laboratory to ensure accuracy of results.

The safeguards included in the reported bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens be analyzed only for the purpose of detecing alcohol and controlled substances designated by the Secretary, except for samples needed for federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (e) provides that no State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under new section 12020, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of the section, and therefore the Committee is acting to preempt those restrictions.

New subsection (e)(2) provides that nothing in new section 12020 shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations issued before the date of enactment that govern the use of alcohol or controlled substances by commercial motor vehicle employees.

The Secretary is directed, in issuing regulations under new section 12020, to establish requirements that are consistent with the international obligations of the United States. The Secretary is further directed to take into consideration any applicable laws and regulations to foreign countries.

New subsection (f) states that nothing in new section 12020 shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under the Commercial Motor Vehicle Safety Act of 1986 or any other provision of law. The Secretary is directed to determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under new section 12020, to have used alcohol or a controlled substance in violation of law or Federal regulation, but are not under the influence of alcohol or a controlled substance, as provided in the 1986 Act.

New subsection (g) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act, specified by the Secretary. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to provide the Secretary with flexibility to ensure that those drugs with the widest potential for abuse be included in the testing programs established under new section 12020.

Section (b) of the bill makes changes to the table of contents of the Commercial Motor Vehicle Safety Act of 1986.

SECTION 6.—PILOT TEST PROGRAM FOR COMMERCIAL MOTOR VEHICLE OPERATORS

Section 6(a) of the bill requires the Secretary of Transportation to design, within 9 months after enactment, and implement, within 15 months after enactment, a pilot test program for the purpose of State testing of the operators of commercial motor vehicles on a random basis to determine whether an operator has used alcohol or a controlled substance in violation of law or Federal regulation. This pilot test program shall be administered as a part of the

Motor Carrier Safety Assistance Program. While it is envisioned that all operators of commercial motor vehicles would be subject to random testing in the States participating in this pilot program, it is the Committee's intent that this program will serve as a test, and establish a record on the effectiveness, of State-administered testing in detecting individuals, such as independent owner-operators and independent drivers, who might otherwise avoid detection through the carrier-administered testing set forth in section 5 of this bill.

Subsection (b) requires the Secretary to solicit the participation of States interested in participating in such program, from which four States shall be selected for participation.

Subsection (c) requires the Secretary to ensure that the selection of participating States is representative of varying geographical and population characteristics and takes into consideration the historical geographical incidence of commercial motor vehicle accidents involving loss of human life. This should ensure a balanced pilot program through a geographical mix of States within the Nation and which have a high incidence of deaths resulting from commercial motor vehicle accidents.

Subsection (d) provides that this pilot program shall continue for a period of one year and requires the Secretary to consider alternative methodologies for implementing a system of random testing of operators of commerical motor vehicles.

Subsection (e) specifies that not later than 30 months after enactment, the Secretary shall report to Congress the results of the pilot program, including any recommendations concerning the desirability and implementation of a system of random testing of operators of commercial vehicles. It is the Committee's intent that this report shall address both the results of the pilot program and include recommendations concerning random testing administered by means other than the carrier-administered random testing envisioned in section 5 of this bill. The Committee intends for this report to specifically address the feasibility and advisability of random testing by State enforcement agencies and address funding for such programs, including the use of the Motor Carrier Safety Assistance Program or other funds for this purpose. The Committee does not intend to preclude consideration in the report of Federal or local testing and other methods that could be effective in detecting operators who might otherwise avoid detection in the carrier-administered program established in section 5 of this bill.

Subsection (f) provides that for purposes of carrying out this pilot program, there shall be available to the Secretary up to $5,000,000 of funds from the Motor Carrier Safety Assistance Program for fiscal year 1990.

Subsection (g) defines "commercial motor carrier" as that term is defined in the Commercial Motor Vehicle Safety Act of 1986. For the purposes of this section, the Committee intends that the term "motor carrier" encompasses persons who employ individuals who operate commercial motor vehicles in commerce as that term is defined in section 12019(3) of the Commercial Motor Vehicle Safety Act of 1986.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted in enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL AVIATION ACT OF 1958

FIRST SECTION OF THAT ACT

That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Federal Aviation Act of 1958":

TABLE OF CONTENTS

Titles I through V * * *

TITLE VI—SAFETY REGULATION OF CIVIL AERONAUTICS

Secs. 601 through 612 * * *
Sec. 613. Alcohol and controlled substances testing.
(a) Testing program.
(b) Prohibition on service.
(c) Program for rehabilitation.
(d) Procedures.
(e) Effect on other laws and regulations.
(f) Definition.

TITLE VI OF THAT ACT

SECS. 601 through 612 * * *

ALCOHOL AND CONTROLLED SUBSTANCES TESTING PROGRAM

SEC. 613. (a)(1) The Administrator shall, in the interest of aviation safety, prescribe regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator) for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Administrator may also prescribe regulations, as the Administrator considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for such use in violation of law or Federal regulation.

(2) The Administrator shall establish a program applicable to employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions. Such program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Administrator may also prescribe regulations, as the Administrator considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for such use in violation of law or Federal regulation.

(3) In prescribing regulations under the programs required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension or revocation of any certificate issued to such an individual, or the disqualification or dismissal of any such individual, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such individual has used, in violation of law or Federal regulation, alcohol or a controlled substance.

PROHIBITION ON SERVICE

(b)(1) No person may use, in volation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section and serve as an airman, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions.

(2) No individual who is determined to have used, in violation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section shall serve as an airman, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions unless such individual had completed a program of rehabilitation described in subsection (c) of this section.

(3) Any such individual determined by the Administrator to have used, in violation of law or Federal regulation, alcohol or a controlled substance after the date of enactment of this section who—

(A) engaged in such use while on duty;

(B) prior to such use had undertaken or completed a rehabilitation program described in subsection (c) of this section;

(C) following such determination refuses to undertake such a rehabilitation program; or

(D) following such determination fails to complete such a rehabilitation program,

shall not be permitted to perform the duties relating to air transportation which such individual performed prior to the date of such determination.

PROGRAM FOR REHABILITATION

(c)(1) The Administrator shall prescribe regulations setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of employees referred to in subsection (a)(1) of this section in need of assistance in resolving problems with the use, in violation of law or Federal regulation, of alcohol or controlled substances. Each air carrier and foreign air carrier is encouraged to make such a program available to all of its employees in addition to those employees referred to in subsection (a)(1) of this section. The Administrator shall determine the circumstances under which such employees shall be required to participate in such a program. Nothing in this subsection shall preclude any air carrier or foreign air carrier from establish-

ing a program under this subsection in cooperation with any other air carrier or foreign air carrier.

(2) The Administrator shall establish and maintain a rehabilitation program which at a minimum provides for the identification and opportunity for treatment of those employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

PROCEDURES

(d) In establishing the program required under subsection (a) of this section, the Administrator shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(A) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(B) establish the minimum list of controlled substances for which individuals may be tested; and

(C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that all laboratories involved in the controlled substances testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(4) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(5) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the results of the confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

EFFECT ON OTHER LAWS AND REGULATIONS

(e)(1) No State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, except that the regulations promulgated under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property, whether the provisions apply specifically to employees of an air carrier or foreign air carrier, or to the general public.

(2) Nothing in this section shall be construed to restrict the discretion of the Administrator to continue in force, amend, or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol and controlled substances by airmen, crewmembers, airport security screening contract personnel, air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), or employees of the Federal Aviation Administration with responsibility for safety-sensitive functions.

(3) In prescribing regulations under this section, the Administrator shall only establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States, and the Administrator shall take into consideration any applicable laws and regulations of foreign countries. The Secretary of State and the Secretary of Transportation, jointly, shall call on the member countries of the International Civil Aviation Organization to strengthen and enforce existing standards to prohibit the use, in violation of law or Federal regulation, of alcohol or a controlled substance by crew members in international civil aviation.

DEFINITION

(f) For the purposes of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Administrator.

FEDERAL RAILROAD SAFETY ACT OF 1970

SECTION 202 OF THAT ACT

SEC. 202. RAIL SAFETY REGULATIONS.

(a) through (q) * * *

(r)(1) In the interest of safety, the Secretary shall, within twelve months after the date of enactment of this subsection, issue rules, regulations, standards, and orders relating to alcohol and drug use in railroad operations. Such regulations shall establish a program which—

(A) requires railroads to conduct preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions (as determined by the Secretary) for use, in violation of law or Federal regulation, of alcohol or a controlled substance;

(B) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and

(C) requires, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law and any rules, regulations, standards, or orders issued under this title.

The Secretary may also issue rules, regulations, standards, and orders, as the Secretary considers appropriate in the interest of safety, requiring railroads to conduct periodic recurring testing of railroad employees responsible for such safety sensitive functions, for use of alcohol or a controlled substance in violation of law or Federal regulation. Nothing in this subsection shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulations, standards, and orders governing the use of alcohol and controlled substances in railroad operations issued before the date of enactment of this subsection.

(2) In carrying out the provisions of this subsection, the Secretary shall develop requirements which shall—

(A) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(B) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(i) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this subsection, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(ii) establish the minimum list of controlled substances for which individuals may be tested; and

(iii) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this subsection;

(C) require that all laboratories involved in the controlled substances testing of any employee under this subsection shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(D) provide that all tests which indicate the use, in violation of law of Federal regulation, of alcohol or a controlled substance by any employee shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(E) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the results of the confirmation test;

(F) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(G) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this subparagraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this subsection; and

(H) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(3) The Secretary shall issue rules, regulations, standards, or orders setting forth requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of railroad employees responsible for safety-sensitive functions (as determined by the Secretary) in need of assistance in resolving problems with the use, in violation of law or Federal regulation, of alcohol or a controlled substance. Each railroad is encouraged to make such a program available to all of its employees in addition to those employees responsible for safety sensitive functions. The Secretary shall determine the circumstances under which such employees shall be required to participate in such program. Nothing in this paragraph shall preclude a railroad from establishing a program under this paragraph in cooperation with any other railroad.

(4) In carrying out the provisions of this subsection, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries.

(5) For the purposes of this subsection, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Secretary.

COMMERCIAL MOTOR VEHICLE SAFETY ACT OF 1986

SECTION 12001 OF THAT ACT

SECTION 12001. SHORT TITLE AND TABLE OF CONTENTS.

(a) * * *

(b) TABLE OF CONTENTS.—

Sec. 12001. * * *
* * *
Sec. 12019. Definitions.
Sec. 12020. Alcohol and controlled substances testing.

SECTION 12019 OF THAT ACT

SEC. 12019. DEFINITIONS. * * *

SEC. 12020. ALCOHOL AND CONTROLLED SUBSTANCES TESTING.

(a) REGULATIONS.—The Secretary shall, in the interest of commercial motor vehicle safety, issue regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Secretary may also issue regulations, as the Secretary considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such operators for such use in violation of law or Federal regulation.

(b) TESTING.—

(1) POST-ACCIDENT TESTING.—In issuing such regulations, the Secretary shall require that post-accident testing of the operator of a commercial motor vehicle be conducted in the case of any accident involving a commercial motor vehicle in which occurs loss of human life, or, as determined by the Secretary, other serious accidents involving bodily injury or significant property damage.

(2) TESTING AS PART OF MEDICAL EXAMINATION.—Nothing in subsection (a) of this section shall preclude the Secretary from providing in such regulations that such testing be conducted as part of the medical examination required by subpart E of part 391 of title 49, Code of Federal Regulations, with respect to those operators of commercial motor vehicles to whom such part is applicable.

(c) PROGRAM FOR REHABILITATION.—The Secretary shall issue regulations setting forth requirements for rehabilitation programs which provide for the identification and opportunity for treatment

of operators of commercial motor vehicles who are determined to have used, in violation of law or Federal regulations, alcohol or a controlled substance. The Secretary shall determine the circumstances under which such operators shall be required to participate in such program. Nothing in this subsection shall preclude a motor carrier from establishing a program under this subsection in cooperation with any other motor carrier.

(d) PROCEDURES FOR TESTING.—In establishing the program required under subsection (a) of this section, the Secretary shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) with respect to laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any subsequent amendments thereto, including mandatory guidelines which—

(A) establish comprehensive standards for all aspects of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of controlled substances tests and strict procedures governing the chain of custody of specimen samples collected for controlled substances testing;

(B) establish the minimum list of controlled substanes for which individuals may be tested; and

(C) establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that all laboratories involved in the testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(4) provide that all tests which indicate the use, in violation of law or Federal regulation, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(5) provide that each specimen sample be subdivided, secured, and labelled in the presence of the tested individual and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation test results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the results of the confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations as may be necessary and in consultation with the Department of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) EFFECT ON OTHER LAWS AND REGULATIONS.—

(1) STATE AND LOCAL LAW AND REGULATIONS.—No State or local government shall adopt or have in effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations issued under this section, except that the regulations issued under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to commercial motor vehicle employees, or to the general public.

(2) OTHER REGULATIONS ISSUED BY SECRETARY.—Nothing in this section shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any regulations governing the use of alcohol or controlled substances by commercial motor vehicle employees issued before the date of enactment of this section.

(3) INTERNATIONAL OBLIGATIONS.—In issuing regulations under this section, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries.

(f) APPLICATION OF PENALTIES.—

(1) EFFECT ON OTHER PENALTIES.—Nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under this title or any other provision of law.

(2) DETERMINATION OF SANCTIONS.—The Secretary shall determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under this section, to have used, in violation of law or Federal regulation, alcohol or a controlled substance but are not under the influence of alcohol or a controlled substance, as provided in this title.

(g) DEFINITION.—For the purposes of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) specified by the Secretary.

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